Supreme Court, U.S.
FILED
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92-426

No.

In The

Supreme Court of the United States

October Term, 1992

ROBERT LOEHR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Cicuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the word "know" in the pre-November, 1991 Sentencing Guidelines included both knowledge and belief, and, if not, whether the *ex post facto* clause of the Constitution was violated when the court computed the petitioner's Sentencing Guidelines using a section which did not become effective until after both the offense and sentencing?

II. Whether a guideline section, promulgated prior to the enactment of the statute which criminalized petitioner's behavior, was correctly applied to petitioner, and whether the district judge was correct in believing that he did not have the authority to use a different and less harsh guideline section when sentencing the petitioner?

III. Whether the Sentencing Guidelines conflict with the enabling statutes and whether that conflict permits a district judge to devise a sentence in an unusual case using the statutory factors rather than the factors mandated by the guidelines?

IV. Whether 18 U.S.C. § 1956(a)(3) is impermissibly vague and therefore unconstitutional?

V. Whether 18 U.S.C. § 1956(a)(3), as a matter of statutory construction, authorized sting operations only as to existing criminal acts or whether Congress intended to authorize the authorities to sting individuals whose acts were not previously criminal?

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OPINIONS BELOW

On June 10, 1992, the United States Court of Appeals for the Sixth Circuit affirmed prtitioner's conviction for attempted money laundering in violation of 18 U.S.C. § 1956(a)(3)(B) (6a). On August 21, 1992, the United States Court of Appeals denied Petitioner's Motion for Reconsideration and Motion to Stay the Mandate of the Case (la, 2a).

STATEMENT OF JURISDICTION

Petitioner, Robert Loehr, now moves this Honorable Court for a writ of certiorari and review of the Judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above titled cause on June 10, 1992 (6a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND UNITED STATES SENTENCING GUIDELINES INVOLVED

Article 1, Section 9, clause 3 of the United States Constitution provides in relevant part:

> No bill of Attainder or ex post facto law shall be passed.

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be...deprived of life, liberty, or property without due process of law...

Title 18 U.S.C. § 1956(a)(3)(B) provides:

> Whoever, with the intent...

> (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity...
>
> conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate unlawful activity shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

18 U.S.C. § 1956(a)(2) provides in relevant part as follows:

> For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in paragraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

Section 2S1.1(a) of the United States Sentencing Guidelines (U.S.S.G.) provides as follows:

> (1) *23*, if convicted under 18 U.S.C. 1956 (a)(1)(A) or (a)(2)(A);

(2) *20*, otherwise.

Section 2S1.l(b)(l) Guidelines (U.S.S.G.) provides as follows:

> (1) If the defendant knew that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by *3* levels.

Section 5A of the United States Sentencing Guidelines (U.S.S.G.) provides in relevant part for Criminal History Score II:

Level 18	30-37 Months
Level 21	41-51 Months

STATEMENT OF THE CASE

On October 26, 1990, Robert Loehr was indicted in a one count indictment charging a violation of 18 U.S.C. § 1956 (a)(3)(B). The indictment alleged that on January 30, 1990, Loehr attempted to conduct an unlawful transaction involving property represented by a person acting at the direction of a law enforcement officer to be the proceeds of drug trafficking.

The trial began On March 5, 1991.

The government's evidence consisted of the following:

1. An incarcerated drug dealer told government agents that some years ago, he had purchased automobiles from a Kalamazoo, Michigan auto dealership using drug proceeds. Petitioner was employed by that dealership at the time, and the drug dealer

claimed that the petitioner knew that the automobiles were purchased using illegal money.

2. The agents determined that petitioner was currently working as a car salesman at a different dealership than the one where the previous sales had allegedly occurred. The petitioner did not have any managerial authority at this new dealership, and his sales activities were subject to the approval of the dealership's upper management.

3. The agents devised a sting operation to determine whether the petitioner would participate in a sales transaction which was allegedly financed with drug proceeds.

4. The drug dealer and his girl friend contacted the petitioner and indicated that they wished to purchase a new vehicle. During the discussions, statements were made which indicated that at least some of the purchase price would be coming from drug sales. These statements were false because the government was financing and directing the sting operation. There was no corroboration of the drug dealer's representations, and the petitioner had no actual knowledge as to whether the representations were true or false.

5. The purchase negotiations spanned several weeks. Among other things, the girl friend asked that the purchase documents contain the name of a third party. The petitioner agreed, and at least some of the documents were prepared using that third party's name. The government contended that the petitioner intended to participate in a scheme to conceal the actual purchaser's identity.

6. In January of 1990, the petitioner submitted some documents to his management relating to the sale of a car to the drug dealer and his girl friend. There was conflicting testimony as

to how much more had to be done to complete the transaction. The petitioner argued that the transaction was incomplete because it had not been approved by management and because additional forms were required. Several employees of the dealership testified that the transaction was between 50% complete to almost totally complete.

7. On January 30, 1990, the girl friend appeared at the dealership and gave the petitioner $20,000 in cash. This money was provided by government agents. The petitioner was arrested while he was counting the money.

On March 8, 1991, a jury convicted the petitioner for the one charged count.

The presentence investigator determined that the base offense score was 20, pursuant to U.S.S.G. 2S1.1 (a)(2). Three points were added on the grounds that the petitioner "knew that the funds were the proceeds of an unlawful activity involving the...distribution of narcotics..." U.S.S.G. 2S1.1 (b)(l). Two points were subtracted for acceptance of responsibility. U.S.S.G. 3El.1 The criminal history score was II. U.S.S.G. 4A. These computations produced sentencing guidelines of 41-51 months. U.S.S.G. 5A.

On May 20, 1991, petitioner was sentenced to 41 months in custody, to be followed by a 2 year period of supervised release.

A timely appeal was taken to the United States Court of Appeals for the Sixth Circuit. The Petitioner argued that his conviction should be reversed or his sentence should be modified for the following reasons:

A. There was insufficient evidence to support the conviction for attempted money laundering. Specifically, petitioner argued

that he had not taken a sufficient overt step towards the completion of the money laundering act and that, as a result, the government had not proved its case.

B. Loehr argued that the money laundering sting statute was unconstitutional because it did not sufficiently notify citizens that previously non-criminal actions were now criminal, because the statute did not define or limit the type of representations made by law enforcement officers, and because the statute vested too much discretionary authority in law enforcement officers to apply the statute according to their individual predilections rather than upon some defined basis.

C. 18 U.S.C. § 1956 (a)(3), the money laundering sting statute, was a newly enacted statute, and petitioner was apparently its first target in the Western District of Michigan. Petitioner was not a drug dealer, and he was receiving no compensation other than a $50-$100 sales commission for the car sale. Petitioner argued that Congress did not intend to include individuals such as himself within the scope of the sting statute. Petitioner further argued that the "representation" language in 18 U.S.C. § 1956 (a)(3) did not include a situation where the representation was incredible and/or where there was no evidence showing that the petitioner believed the drug related representations made by the individual acting at the government's behest.

D. Petitioner argued that there was a Jencks Act violation and that evidence was admitted in violation of Fed. R. Evid. 404 (b).

E. Finally,petitioner raised a number of sentencing guideline issues. Just prior to his sentencing, the Sixth Circuit had decided *United States v. Davern*, 937 F.2d 1041 (6th Cir. 1991). In *Davern*, a panel of the court ruled that the a portion of Sentencing Guidelines were unconstitutional because they were in conflict with 18 U.S.C. § 3553. *Davern* was vacated during the appeal

process and accepted for *en banc* review.

Petitioner also challenged the use of a base level of 20, pursuant to U.S.S.G. 2S1.1 (a), and the three levels that were added pursuant to 2S1.1 (b), on the grounds that petitioner "knew" that the money was drug related.

On June 10, 1992, the Sixth Circuit affirmed petitioner's conviction and sentence. (6a) This decision is reported as *United States v. Loehr*, 966 F.2d 201 (6th Cir. 1992). The Court ruled that Loehr's acceptance of the $20,000 in cash and the completion of at least some of the documents were substantial steps toward the execution of the criminal act, justifying his conviction for attempt. (10a). The Court further ruled that the statute was not vague because it clearly applied to anyone who had the intent to engage in the proscribed conduct. (11a). As to the Sentencing Guideline issues, the Court concluded that the district court's decision to use U.S.S.G. 2S1.1 to determine the base guidelines was not clear error. (12a) The three level aggravator was appropriate because "the evidence was sufficient to prove that the defendant had the necessary knowledge or belief that the source of the funds for the transaction was from drug proceeds." (12a). The remainder of petitioner's claims were dismissed without specific consideration (12a.).

Petitioner filed a timely petition for reconsideration and suggestions for rehearing in banc. This petition was denied without explanation on August 21, 1992 (1a, 2a).

REASONS FOR GRANTING WRIT

There are five reasons for granting the writ. Three reasons relate to the United States Sentencing Guidelines, one reason is a significant question of statutory interpretation, and the fifth reason addresses the constitutionality of the money laundering sting

statute, particularly as it is applies to individuals who are neither professional drug dealers nor professional money launderers.

A. SENTENCING GUIDELINES: THE THREE LEVEL ADDITION FOR "KNOWLEDGE"

There is a conflict between the Fifth and Sixth Circuits as to whether the three level addition should apply to a case such as petitioner's. The issue involves both an interpretation of a specific guideline section and a constitutional *ex post facto* question. This conflict between Circuits about an important legal issue justifies this Court's attention and the granting of the writ.

U.S.S.G. 2S1.1(b)(1) provides that three levels can be added to a defendant's base offense score under certain circumstances. In January of 1990, when the offense was committed, the guideline section read as follows:

> (1) If the defendant knew that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.

In November of 1991, this section was amended by adding the language "or believed". The section then read "if the defendant knew or believed that the funds...". Amendment 378 to the United States Sentencing Guidelines. The Sentencing Commission explained the reason for the modification:

> This amendment revises the guideline to reflect the enactment of subsection (a)(3) of 18 U.S.C. 1956 that authorizes undercover "sting" operations in money laundering cases. Such cases differ from those prosecuted under

> subsection (a)(l) in that the money being laundered is not actually criminal proceeds, but is government "sting" money that an undercover officer represents to be criminal proceeds. In all other respects, subsection (a)(l) and (a)(3) are the same. *The effective date of this amendment is November 1, 1991.* (emphasis in original).

Amendment 378 to the United States Sentencing Guidelines.

The Fifth Circuit addressed the meaning and applicability of the amendment in *United States v. Breque*, 964 F.2d 381 (5th Cir. 1992). The *Breque* case was decided five days after the Sixth Circuit rendered its decision in the instant case.

In *Breque*, the Internal Revenue Service and the United States Customs Service conducted a joint sting operation. An IRS agent approached the defendant and represented that she was acting on behalf of a Florida based organization which needed to exchange money.

A number of transactions occurred between June of 1989 and June of 1990 in which dollars were given to the defendant. The defendant changed those dollars into pesos and charged a fee for his services. The defendant was arrested after the last transaction. Among other things, he was convicted of conspiring "to launder money represented by a law enforcement officer to be the proceeds of specified unlawful activity (narcotic sales), in violation of 18 U.S.C. 1956 (a)(3)(C)."

The defendant was sentenced to 55 months in prison, in accordance with the procedures mandated by the United States Sentencing Guidelines. One of the components of the guideline computation was a three level increase, pursuant to U.S.S.G. 2S1.l(b)(l).

Breque argued that the three level increase was inappropriate because he did not "know" that the money was the proceeds of unlawful activity. In fact, the money was not proceeds of such activity, but legitimate government funds.

The government argued that the section only required a "subjective certainty" on the defendant's part and that accordingly, the objective truth of the fact was irrelevant.

The Fifth Circuit held that the three level addition was in error and vacated and remanded the sentence.

In reaching this decision, the Court noted the 1991 amendment to the guidelines, which allowed the adder if the defendant "knew or believed" that the money laundered had an illegal source. The Court first concluded that the 1991 amendment made a substantive change in the guidelines. Accordingly, the Court reasoned that it would be inappropriate to apply the new section to a defendant whose crime pre-dated the guideline change. *Cf.*, *Miller v. Florida*, 482 U.S. 423 (1987).

The Court then further concluded that the word "believed" was added because the word "know" was insufficient to cover sting operations. Since the money was in fact legal money, the defendant could never "know" that the money had an illegal source. At most, a defendant could only "believe" that the source was illegal.

Accordingly, since the defendant could not "know" that the source was illegal and since knowledge was the standard for the three point aggravator, the three points could not be added when computing the guideline sentence for a defendant whose sting related offense pre-dated November 1, 1991.

If *Breque* were applied to petitioner, his sentence would have

to be vacated and remanded for re-sentencing. This remand would almost certainly result in a lower sentence because the petitioner's guidelines would change from 41-51 months (Level 21) to 30-37 months (Level 18). U.S.S.G. 5A. These guideline ranges do not overlap one another. Moreover, the district judge originally sentenced the petitioner at the bottom of the applicable guideline range; if the district court used the same procedures with the revised guidelines, the difference would be 11 months.

There is another substantive impact involved in this potential sentence modification. 18 U.S.C. § 4046 authorizes a "shock incarceration program." This program allows an individual to serve a prison sentence of between 12-30 months by participating in a 6 month, alternative, boot camp program. Petitioner probably qualifies for the program, except that his sentence exceeds the statutory range. However, if the petitioner is correct and if the sentence is modified to 30 months, he could qualify for this specialized program and could satisfy his sentence much more quickly than he can under current conditions. This rather unique aspect to petitioner's case further supports this Court's consideration.

The conflict between the Fifth and Sixth Circuits is illustrated by considering two Sixth Circuit cases: the instant case and *United States v. Payne*, 962 F.2d 1228 (6th Cir. 1992).

In *Payne*, a money laundering sting operation took place between July of 1988 and April of 1989. The defendants were convicted and sentenced in June of 1991 according to the procedures mandated by the United States Sentencing Guidelines. Three levels were added using U.S.S.G. 2S1.1 (b)(1). One of the defendants challenged this aggravator on the grounds that the money was not actually drug money. The Circuit Court affirmed, but in doing so applied the guideline "knew or believed" language even though that language did not take effect until five months

after the defendants were sentenced. Specifically, the Court held that "the Guideline indicates that as long as the defendant believes that the funds were the proceeds of unlawful activity, the Guideline applies." 962 F.2d at 1235.

The instant case continues the same approach in that the Court upheld the aggravator using the same "knew or believed" language (12a).

Neither *Payne* nor the instant case addressed the issue reached by the *Breque* court of whether the November, 1991 guideline amendment was substantive and whether there was an problem in applying the change to an offense completed prior to the amendment's effective date.

In *Miller v. Florida*, 482 U.S. 423 (1987), this Court reversed a decision of the Florida courts which applied a sentencing guideline enacted after the crime which was more detrimental to the defendant than the guideline which was in effect at the time the crime was committed.

As the Fifth Circuit reasoned in *Breque*, the guideline change at issue in the instant case substantively and detrimentally changed the guideline rules. The "believe" language was specifically added to deal with the statute which related to petitioner and specifically made the three point aggravator applicable to petitioner. Prior to the change, the aggravator would have been inappropriate.

Thus, the Sixth Circuit's reasoning in *Payne* and the instant case is not only contrary to the Fifth Circuit's decision in *Breque*, but contrary to a decision of this Court. Certiorari should be granted to remedy this conflict.

B. SENTENCING GUIDELINES: THE APPLICABILITY OF U.S.S.G. 2S1.1 (a)(2)

U.S.S.G. 2S1.1 was originally promulgated to apply to individuals who were caught in the act of violating the money laundering laws. The penalties are relatively harsh: a first offender faces a base guideline offense level of 20, which translates to a sentence between 33-41 months. U.S.S.G. 2S1.1 (a) and U.S.S.G. 5. This mandatory minimum penalty is a creature of the Sentencing Commission and was not mandated by Congress.

The sting amendment potentially applies to an entirely different group of defendants: individuals who were not violating the money laundering statutes until offered an opportunity to do so by government agents or those acting at the direction of those agents.

The level of culpability of such individuals might be far different from the individuals Congress had originally targeted. The level of culpability of such individuals might be far different from the issues which the Sentencing Commission considered when it originally promulgated the guidelines.

In January of 1990 when the petitioner committed the offense or in May of 1991 when he was sentenced, no change had been made to the guidelines to consider the potential impact of the 1988 amendments to 18 U.S.C. § 1956.

Petitioner argued that the district judge was free to consider other money laundering guideline sections in evaluating his offense. The district judge did not believe that he had such authority, and the Sixth Circuit did not address the issue.

This is a problem which regularly arises when interpreting the guidelines. The guidelines have been frequently amended since their original passage, and numerous situations arise where the

offense conduct does not neatly fit within the guideline definitions. Although the guidelines themselves provide some guidance, the scope of a district judge's authority is hardly clear.

For this reason, it would be appropriate for this Court to accept this case and to establish rules which will govern and better define numerous sentencing decisions that are being made daily by district judges.

C. SENTENCING GUIDELINES: THE CONFLICT BETWEEN THE GUIDELINE SENTENCING SCHEME AND 18 U.S.C. § 3553

There is a substantial dispute among members of the Federal Judiciary as to the scope of the guidelines and the ability of judges to respond to unique situations which do not fit neatly within the guidelines or the statutory scheme.

This case illustrates this dispute and disagreement, and, for that reason, it would be appropriate to grant certiorari so that this on going controversy can be resolved.

18 U.S.C. § 3553 (a) states that "the court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." Paragraph (2) states that the court shall consider deterrence, public protection, the needs of the defendant, the seriousness of the offense, and appropriate punishment.

18 U.S.C. § 3553 (b) states that the court shall impose the sentence mandated by the guidelines "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission..."

The Sentencing Guidelines mandate a procedure whereby the guideline sentence is computed and where the court thereafter considers whether a departure of some kind is appropriate. U.S.S.G. 1B1.1

On June 20, 1991, after petitioner's sentencing but prior to the filing of petitioner's appeal, the United States Court of Appeals for the Sixth Circuit decided the case of *United States v. Davern*, 937 F.2d 1041 (6th Cir. 1991). *Davern* addressed the question of whether the guideline approach comported with the enabling statute. In a 2-1 decision, the *Davern* panel held that the guideline section was invalid because it reversed the emphasis mandated by statute. The majority felt that a court should first determine whether or not the case was in the heartland of cases addressed by the Sentencing Commission. If not, the court should be allowed to impose a sentence which comports with the factors mandated by 18 U.S.C. § 3553 (a). On the other hand, if the case was within the heartland, then the Court could apply the guidelines as mandated by statute. 937 F.2d 1043-1047. Chief Judge Merritt's thoughtful opinion examined the legislative history and scholarly articles including an excellent overview by university professors and editors Freed & Miller, published at 3 Fed. Sent. R. 237 (1991).

This type of concern has also been reflected by other federal judges who have expressed concern with what they view as guideline inflexibility and the failure of the guidelines to adhere to the statutory mandate. *See, e.g., United States v. Harrington*, 947 F.2d 956, 966-968 (D.C. Cir. 1991); *United States v. Kikumura*, 918 F.2d 1084, 1119-1121 (3d Cir. 1990) (and the cases there cited); *United States v. Gutierrez*, 908 F.2d 349, 353-355 (8th Cir. 1990).

The petitioner's appeal argued that *Davern* controlled and was correctly decided. The petitioner further argued that his case was not in the heartland in that there was no legislative history to

indicate that someone like himself was the primary target of the statutory amendment. Accordingly, petitioner sought re-sentencing in a circumstance where the court would first look to the uniqueness of his case and then, secondarily, to the guideline rules.

On September 26, 1991, the Sixth Circuit vacated the *Davern* decision and granted en banc review.

The en banc decision had not been reached when petitioner's appeal was decided, and the Sixth Circuit opinion did not address the question.

On July 21, 1992, in a 10-4 decision, the court vacated the *Davern* decision and upheld the guideline sentencing scheme. *United States v. Davern*, 1992 WL 167526 (6th Cir. 7/21/92).

The majority held that the guidelines are "a sentencing imperative" and that a court cannot deviate other than by making a departure as authorized by 18 U.S.C. 3553 (b). In support, the majority cited *Burns v. United States*, 112 S.Ct. 2182, 2184-2185 (1991) where, in a different context, this Court stated that "the only circumstance in which the district court can disregard the mechanical dictates of the Guidelines is when it finds that there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."

The Sixth Circuit went on to reason that a sentencing judge must follow the format outlined at U.S.S.G. 1B1.1 by first determining the guideline sentence and then determining whether the court should depart from such a sentence.

The dissent argued that the guideline drafters had exceeded the authority granted them by the enabling statutes found in Title

18 and Title 28. This created a conflict between the guidelines and the enabling statute, and, in such a situation, the enabling statute should control. The dissent cited a long list of scholarly articles which expressed the same views as the dissent. 1992 U.S. App. Lexis 16564, *43, n. 11. The dissent concluded that the majority erred and that the guideline structure was flawed because the Sentencing Commission recognized some, but not all, of the requirements mandated by Congress.

The *Davern* debate is a microcosm of a debate which has great significance for the administration of justice.

This Court should use this case as a basis for addressing this debate and for expressing its views on the relationship of the various authorizing statutes to the guidelines and on the authority of sentencing judges to deal with uncommon situations or with factors which have historically justified sentencing leniency.

This debate is too important to be ignored.

D. 18 U.S.C. § 1956 (a)(3) IS UNCONSTITUTIONAL

18 U.S.C. § 1956 was amended, effective November 18, 1988, to allow law enforcement agencies to carry out money laundering sting operations. 18 U.S.C. § 1956 (a)(3); 102 Stat. 4392, Pub. L. 100-690. The major differences between this new statutory section and the previous version of the statute were the following:

1. Prior law required that the laundered property actually be the proceeds of "specified unlawful activity", as that term is defined in 18 U.S.C. § 1956 (c)(7). The amended statute allows a conviction even though the allegedly laundered property has a legal source.

2. The amended statute authorizes law enforcement officers to

directly or indirectly represent that property is either "the proceeds of unlawful activity or property used to conduct or facilitate specified unlawful activity." 18 U.S.C. § 1956 (a)(3).

3. The statute does not provide the parameters of the sting, the nature of the representation made by law enforcement officers or third parties acting at their direction or the nature of the sting's targets.

The amended statute carries a 20 year penalty.

Petitioner challenges the constitutionality of the statute for the following reasons:

1. The statute does not sufficiently notify citizens regarding the potentially serious criminal implications of their acts.

2. The failure to define or limit the type of representations made by law enforcement officers or their designees makes the statute unconstitutionally vague.

3. The statute is unconstitutionally vague because it vests too much discretionary authority in law enforcement officers to apply the money laundering statutes based upon their individual predilections rather than upon some defined basis.

4. All of these flaws are particularly important because the new statutory section criminalized behavior that was previously non-criminal. The pre 1988 law required that the money actually be the proceeds of illegal activity. The new law permits sting operations where the money, in fact, comes from the government.

This Court addressed a similar problem in *Kolender v. Lawson*, 461 U.S. 352 (1983). In *Kolender*, this Court examined a California statute which required individuals who loiter or wander

the streets to provide "credible and reliable" information and account for their presence when required to do so by a law enforcement officer. Lawson had been arrested several times and convicted once for violating the statute. He challenged the statute and sought a declaratory judgment that the statute was unconstitutional.

This Court agreed and held that the statute was indeed unconstitutional. This Court stated that any penal statute must meet two basic criteria:

1. It must define the offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited;

2. It must define the offense in a manner which does not "encourage arbitrary and discriminatory enforcement." 461 U.S. at 357 and the cases there cited.

This Court further noted that the primary concern is that the legislature must establish "minimal guidelines to govern law enforcement." 461 U.S. at 358. *See, also, Smith v. Goguen*, 415 U.S. 566, 574 (1974).

The California statute was flawed because it vested "virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go his way in the absence of probable cause to arrest. " 461 U.S. at 358. Accordingly, because the statute did not define what was intended by the requirement that a suspect provide "credible and reliable" information, the statute encouraged arbitrary and unpredictable enforcement. The statute provided absolutely no restraint on the police's power to arrest and charge a person with a violation. *Cf., Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974).

The statute is flawed in this case for a very similar reason . 18 U. S . C . 1956 (a) (3) legislatively authorizes law enforcement agencies to conduct sting operations. The sting is carried out when the law enforcement officer of a designee represents that property is either the "proceeds of specified unlawful activity or property used to conduct or facilitate specified unlawful activity." 18 U.S.C. § 1956 (a)(3).

The statute is unconstitutional because the legislature did not specify any minimal guidelines to govern law enforcement. A law enforcement official has absolutely no guidance as to who should be targeted, how the sting should be constructed, and what safeguards, if any, should be instituted to protect an otherwise unaware citizen from arbitrary or discriminatory enforcement.

The facts of this case clearly illustrate the due process concern. The petitioner was not a mainstream defendant. He was not a drug dealer; he was not a professional money launderer; he was not separately compensated for participating in the allegedly tainted transaction. *Cf.*, cases such as *United States v. Breque*, 964 F.2d 381 (5th Cir. 1992), *United States v. Payne*, 962 F.2d 1228 (6th Cir. 1992), *United States v. Richardson*, 925 F.2d 112 (5th Cir. 1991) and *United States v. Hardy*, 762 F.Supp. 1403 (D. Hawaii, 1991), which illustrate the application of the sting statute to individuals who are laundering money on a regular basis.

There is no legislative history to the statute and no indication as to whether Congress intended to target professional money launderers by making it easier for law enforcement officials to pursue individuals who were in the business or whether Congress intended to include any individual selected by law enforcement, even if that individual was not presently involved in money laundering.

This lack of standards and direction points out the

constitutional problem. Since Congress did not establish any standards for the legislatively authorized sting, it created a vagueness which is violative of due process; the statute on its face permits law enforcement officials full rein to "pursue their individual predilections".

A second constitutional problem is the vagueness of the "representation" section of the statute. Petitioner's complaint is that Congress did not sufficiently define the type of representation that exposes an individual to criminal liability. Specifically, the question is whether a representation which is incredible, unbelievable, or doubtful can form the basis of criminal liability.

The underlying statutory assumption is that the representation is false: the government, by definition, is representing that legal money is in fact illegal. If the defendant believes the government and the defendant's actions are based upon that belief, conviction follows.

However, the flaw arises because Congress did not exculpate or otherwise address defendants who do not believe the false statements and/or whose actions are not based upon the government's representation or who feel that they can act legally because they believe that the representation is false and that illegal money is not really involved.

Petitioner's case illustrates the point. Petitioner had ample reason to doubt or disregard the representations made about the source of the proceeds. The drug dealer had been in jail for several years, and petitioner had no reason to believe that he had any drugs or the proceeds of any drugs left over from the drug dealer's previous illegal dealings. Petitioner had no corroboration for the statements that drugs were involved. For all petitioner knew, the statements could be false.

Moreover, and most importantly, the government in this case constructed the sting so that the petitioner might easily believe that the representation was false. Petitioner was in a business where puffing is common. It is commonplace for customers to lie about the amount of money that is available to buy the car, in the hopes that the lie will either induce the car dealer to lower the price or to sweeten the deal. As a result, any experienced car salesman will tend to discount these statements, particularly if the facts suggest that the statements are being used as a negotiating ploy.

In this case, the government did not come to petitioner and propose a simple and straightforward deal. In other words, no one approached petitioner and said "here is $20,000; this money comes from a drug deal; sell me a car"; no one approached petitioner and offered him money to arrange the deal. Rather, the government constructed the sting so that it extended over a number of weeks. Petitioner's only compensation was his regular commission from the sale. Petitioner was told that the parties were trying to sell narcotics but were having trouble making the sale. Efforts were made to minimize the price of the car. In other words, the entire sting could have been construed as just another ploy by a customer to get a better deal.

This ambiguity was made possible by Congress's failure to live up to its mandate and to specify standards by which law enforcement officers should act.

Finally, the statute did not put petitioner or others similarly situated on notice that his actions violated federal criminal law. The lack of notice was caused by the overly vague definition of the word "representation" which permits criminal liability regardless of whether the defendant believed the representation or whether the allegedly criminal acts had anything to do with the representation made. It is also caused by the failure to define the parameters of the legislatively authorized sting.

Finally, the constitutionally significant lack of notice is caused because money laundering is not an easily definable concept, particularly to a lay citizen who is neither a drug dealer nor a professional money launderer.

A drug dealer knows he is committing a crime. A person who takes money to conceal the source of funds knows that his acts are illegal. On the other hand, a car salesman who is told a questionable story and who is not being separately compensated for his acts does not have adequate notice. The vagueness thus makes it possible for someone to break the law even if that person honestly believes that the representation is false.

The Sixth Circuit did not really deal with this issue. The Court merely held that the statutory prohibition is clear and that someone like petitioner is guilty if he intentionally enters into the prohibited transaction. (11a)

This Court should grant certiorari because this is an important criminal statute which has yet to be authoritatively interpreted. If petitioner is correct, his rights and the rights of many others similarly situated have been or will be violated. The question is sufficiently important to warrant this Court's consideration.

E. THE SCOPE OF THE MONEY LAUNDERING STING STATUTE IS UNCLEAR, AND CERTIORARI WOULD BE APPROPRIATE TO INTERPRET THIS IMPORTANT STATUTE

Prior to 1988, the money laundering statute exclusively targeted individuals who were actually laundering illegal money. These individuals included professional drug dealers, professional money launderers, or other individuals or entities who received compensation for assisting others to conceal illegal money. Neither the pre-1988 statute nor the cases dealt with ordinary

citizens whom the government might be able to tempt if that otherwise innocent citizen was targeted by agents.

There are two possible interpretations of the 1988 amendment. The first interpretation is that Congress only intended to give law enforcement officials an additional tool to pursue the types of offenders who had already been targeted by the statute. 18 U.S.C. § 1956 (a)(l) and (a)(2). The existing statutes required law enforcement officials to catch the targets in the act; the amended statute would allow law enforcement officers to aggressively pursue these often elusive professionals by affirmative actions. The reported cases indicate that this is indeed the more common approach taken by law enforcement. *See, e.g., United States v. Breque,* 964 F.2d 381 (5th Cir. 1992), *United States v. Payne,* 962 F.2d 1228 (6th Cir. 1992), *United States v. Richardson,* 925 F.2d 112 (5th Cir. 1991) and *United States v. Hardy,* 762 F.Supp. 1403 (D. Hawaii, 1991).

The second possible interpretation, which is at the heart of the government's prosecution in the instant case, is that Congress expanded the scope of the statute and authorized the government to operate stings against any citizen, regardless of whether that citizen was engaging in the kinds of conduct that would expose that citizen, if caught, to prosecution under the existing money laundering provisions.

The language of the statute is not clear, and there is no legislative history on the subject. The broad and expansive interpretation of criminal liability sought by the government should not be adopted without some direct indication from Congress that the expansive interpretation is what Congress intended. Such a position is consistent with previous decisions of this Court which have held that when a criminal statute is vague and the intent of Congress unclear, the Court should adopt the interpretation which limits rather than expands the scope of

criminal liability. *See, e.g., Bifulco v. United States*, 447 U.S. 381 (1980) and *Ladner v. United States*, 358 U.S. 169 (1958).

A second statutory interpretation question is suggested by the previous section on constitutionality. "Representation", as that word is used in Section § 1956 (a)(3), is defined very broadly and does not address the issue of whether the defendant believed the representation made by the law enforcement official.

Petitioner argued below that the government had to establish that he believed the representation made by the drug dealer and that the government's failure to do so flawed his conviction. In support of his argument, he pointed to a 1990 amendment to 18 U.S.C. § 1956 (a)(2) which specifically conditioned criminal liability upon a determination that the defendant's subsequent words or actions indicate that the defendant believed that the representations were true.

The Sixth Circuit did not address this argument, but it is an important issue worthy of this Court's review.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court grant certiorari and resolve the conflict between the Circuits on the applicability of the amended language in the United States Sentencing Guidelines, Sect. 2S1.l(b)(l) to a sting operation's target whose offense occurs prior to November 1, 1991. Petitioner further prays that this Court grant certiorari to consider the applicability of the minimum sentence required by the money laundering guideline rules to a factual circumstance which was not a crime at the time that the rules were enacted. Petitioner prays that this Court grant certiorari to resolve a conflict among Circuit judges as to the relationship between 18 U.S.C. § 3553 and the United States Sentencing Guidelines. Petitioner also prays that this Court grant certiorari to consider the important question of the

scope of the new federal money laundering sting statute and whether it applies to citizens who are not actively involved either in the drug tradeor with money laundering. Finally, Petitioner prays that this Court grant certiorari to consider whether the money laundering sting statute is unconstitutional because it provides insufficient guidance to law enforcement officials.

Respectfully submitted,

DAVID A. DODGE
Counsel of Record
DAVID A. DODGE, P.C.
Attorneys for Petitioner

APPENDIX A — ORDER ENTERED AUGUST 21, 1992

No. 91-1655

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT LOEHR,

Defendant-Appellant.

ORDER

The appellant moves to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court.

Upon consideration, it is ORDERED that the motion be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX B — JUDGMENT DATED AUGUST 21, 1992

No. 91-1655

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT LOEHR,

Defendant-Appellant.

BEFORE: Nelson and Boggs, Circuit Judges; Keupansky, Senior Circuit Judge

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Issued as Mandate: August 21, 1992

Appendix B

COSTS: None

Filing fee .....$

Printing .....$

Total .....$

A True Copy.

Attest:

Sue Johnson
Deputy Clerk

APPENDIX C — ORDER & DECISION FILED JUNE 10, 1992

No. 91-1655

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT LOEHR,

Defendant-Appellant.

ORDER

BEFORE: NELSON and BOGGS, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Appendix C

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Appendix C

No. 91-1655

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT LOEHR,

Defendant-Appellant.

On Appeal from the United States District Court for the Western District of Michigan

Decided and Filed June 10, 1992

Before: NELSON and BOGGS, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

KRUPANSKY, Senior Circuit Judge. Appellant, Robert Loehr (defendant), appealed the district court's judgment convicting him of attempted money laundering in violation of 18 U.S.C. § 1956(a)(3)(B) and the imposed sentence of 41 months incarceration, two years of supervised release, and a mandatory special assessment fee of $50.00 pursuant to the November 1990 United States Sentencing Guidelines (U.S.S.G.). The defendant asserted several assignments of error on appeal.

Appendix C

The defendant was a car salesman in Grand Rapids, Michigan. Law enforcement personnel became aware of appellant from his past relationship with a convicted drug trafficker, Credell "Petey" Carpenter (Carpenter). Carpenter advised Special Agent Sanford Simons (Simons) that the defendant had sold him and his girlfriend, Chrystal Bell (Bell), vehicles in 1986 and 1987 knowing that they were purchased with the proceeds from drug transactions. Further, Carpenter revealed that Loehr knew him to be a drug dealer.

With the assistance of Carpenter and Bell, Simon initiated a "sting" investigation to determine if Loehr was laundering money through his employer's car dealership. The sting required that Carpenter and Bell attempt the purchase of an automobile after clearly informing the defendant that the purchase price was to be paid from drug proceeds. Further, the purchase required that Loehr title the vehicle in the name of a fictitious third party.

After he was contacted by Bell and Carpenter and advised that the vehicle would be purchased with drug money, the defendant agreed to sell Carpenter a selected automobile for cash without executing an IRS Form 8300 evidencing a cash sale in excess of $10,000 and to title the vehicle in a fictitious name. The defendant prepared the requisite paper work, i.e., a purchase agreement signed by Bell in a fictitious name. He presented the sales agreement to David Delaat, Jr. (Delaat, Jr.), the general manager of the automobile dealership, who typed the information onto the proper form and completed the other necessary purchase documentation, such as the state registration application, the odometer statement, and the temporary registration. Delaat, Jr. noted that the driver's license number and proof of insurance were missing.

On the day of the transaction, Bell arrived at the dealership with an undercover agent and gave the defendant $20,000 in cash.

Loehr accepted the money and told Bell she could take possession of the car that day. Thereafter, Simon and another special agent entered the dealership and found the defendant in a windowless room where he was in the process of counting the money. Loehr was later indicted and charged with attempted moneylaundering in violation of 18 U.S.C. § 1956(a)(3)(B).

During the jury trial, three witnesses testified concerning the paperwork required to complete an automobile transaction. Delaat, Jr. testified that when the purchase agreement was presented to him for typing, the transaction was completed. Craig Brockette, the owner of the dealership, stated that the transaction in the instant action was near completion. David Delaat, Sr., the business manager, testified that the transaction in the instant action was over 50% completed.

In order to prove that the defendant knew Carpenter and Bell in the past and that Carpenter was a drug dealer, the court permitted the testimony of various witnesses who described Loehr's past interactions with Carpenter. Agent Simon testified that in 1986 and 1987 the defendant worked at his father's car dealership where he met Carpenter and Bell. Joshua Simpson, who had previously worked with the defendant at his father's car dealership, testified that Loehr knew Carpenter was a drug trafficker and that the defendant and Carpenter had met during a car transaction in 1986 or 1987. Finally, Carpenter testified that he was a drug dealer and had met the defendant at his father's car dealership where he told Loehr that he was a drug dealer. The defendant objected to the foregoing testimony charging that it was evidence of prejudicial "similar acts" in violation of Rule 404(b) of the Federal Rules of Evidence. The court overruled the defendant's objections concluding that the evidence was probative to prove Loehr's intent to engage in the money-laundering scheme and his knowledge of the IRS

requirement to file a form whenever a money transaction over $10,000 takes place.

The jury returned a verdict of guilty against the defendant. The court sentenced him to 41 months incarceration, two years of supervised release, and a mandatory special assessment fee pursuant to the November 1990 United States Sentencing Guidelines. During the sentencing hearing, the defendant asserted several objections to the presentence report, including the accuracy of the offense level computation and urged the court to depart downward from the guidelines. The court overruled his objections and determined that the defendant had a base offense level of 20 pursuant to U.S.S.G. § 2S1.1(a)(2). Thereafter, the court increased the offense level by three to account for specific offense characteristics pursuant to 2S1.1(b)(1). After allowing defense counsel time to present additional arguments, the court decided not to depart downwards from the guideline's sentence as requested by the defendant.

In his first assignment of error, the defendant argued that the evidence was not sufficient to prove that he performed one or more overt acts to constitute a substantial step toward the commission of the attempted money-laundering offense. In order to prove that a criminal offense was an attempt within the meaning of the statute here in issue, the government must prove that the individual charged intended to engage in the proscribed criminal activity and that the accused performed an overt act in furtherance of the criminal act proscribed by the statue. *United States v. Pennyman*, 889 F. 2d 104, 106 (6th Cir. 1989). The degree of a defendant's performance of a substantial act in furtherance of the illegal activity is a factual issue to be resolved according to the circumstances of each particular case. *United States v. Joyce*, 693 F. 2d 838 (8th Cir. 1982). The government:

> is under no obligation to wait until the sale was actually completed before intervening. that is of course true for if the sale has been completed it is no longer a mere attempt. Something less than a consummated sale suffices to prove an attempt provided it is a substantial step toward completion.

United States v. Cea, 914 F. 2d 881, 888 (7th Cir. 1990).

The record disclosed that the defendant accepted over $20,000 in cash for the sale of an automobile and that Bell made it clear that she intended to take the car with her that same day. Further, the defendant prepared paperwork in the name of a fictitious buyer as directed by Bell in an effort to complete the transaction at issue, and he assured the purchaser that the IRS form required to disclose cash transactions that exceeded $10,000 would not be filed. Although three witnesses testified that the transaction was either completed, near completion, or 50% completed, a reasonable juror could have concluded that the defendant's actions were a substantial step toward the commission of the crime charged. The government was not required to prove that the transaction was completed. Accordingly, this assignment of error is without merit.

Loehr next contended that the statute, 18 U.S.C. § 1956(a)(3)(B), was void-forvagueness and not intended to apply to an individual such as himself who was not actively engaged in money-laundering or drug dealing before the initiation of the sting operation, The rule of statutory construction begins with the plain meaning of the words in the statute. *United States v. Ransbottom*, 914 F. 2d 743, 745 (6th Cir.), *cert. denied*, 111 S. Ct. 439 (1990). The void-for-vagueness doctrine requires only that "ordinary" people can understand what conduct is prohibited and in a manner that does

not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983). The vagueness of statutes that do not threaten first amendment interests is examined in light of the case at hand. *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 1858 (1988).

An examination of 18 U.S.C. § 1956(a)(1)(B) indicates that in order for an accused to be convicted under the above provision, the government must prove that he had the specific intent to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity. Furthermore, representations must be made by law enforcement officers, or by those acting under their direction, and must relate to specified unlawful conduct enumerated in the statute pursuant to § 1956(c)(7). The provision is clear and applies to anyone who has the requisite intent to engage in the conduct as defined in the statute. See also *United States v. Jackson*, 935 F. 2d 832 (7th Cir. 1991) (court concluded that § 1956(a)(1) was not unconstitutionally vague). Accordingly, this assignment of error is without merit.

The defendant next argued that the court abused its discretion when it admitted evidence of the defendant's past associations with Carpenter because such evidence violated Fed. R. Evid. 404(b). Rule 404(b) generally prohibits the introduction of testimony that relates to prejudicial similar acts unless that evidence bears upon a relevant issue in the case such as motive, opportunity or knowledge. *United States v. Zelinka*, 862 F. 2d 92, 98 (6th Cir. 1988). The court determined that the testimony of Agent Simons, Simpson, and Carpenter was probative of the defendant's intent and knowledge. There was no mention in the admitted testimony that Carpenter had purchased automobiles in the past from the defendant using drug money. Accordingly, the trial court did not abuse its discretion when it permitted this testimony to be admitted into evidence.

Finally, the defendant charged that the court erred in its application of the November 1990 Sentencing Guidelines. Loehr noted that U.S.S.G. § 2S1.1 was drafted before the enactment of 18 U.S.C. § 1956(a)(3). Thus, he contended that it was designed to punish a class of defendants to which he did not belong. However, "[t]his court will give due deference to a district court's application of the Guidelines to the factual situation found to exist and will review such a choice for clear error." *United States v. Hamilton*, 929 F. 2d 1126 (6th Cir. 1991). We do not believe that the district court committed clear error in the choice it made. Further, the district court correctly elevated the base level offense by three because the evidence was sufficient to prove that the defendant had the necessary knowledge or belief that the source of the funds for the transaction was from drug proceeds. Finally, the defendant may not appeal the failure of the district court to depart from the guidelines when the sentence imposed is within the guidelines and otherwise valid. *United States v. Draper*, 888 F. 2d 1100 (6th Cir. 1989). This court concludes that the defendant's remaining assignments of error are equally without merit.

Accordingly, after a review of the record, the briefs and arguments of counsel, the district court's disposition is hereby AFFIRMED.

Supreme Court, U.S.
FILED
NOV 18 1992
OFFICE OF THE CLERK

No. 92-426

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT LOEHR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ROBERT S. MUELLER, III
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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1956(a)(3)(B), which makes it a crime to launder money represented by an undercover law enforcement or by another person at the direction of a law enforcement officer to be the proceeds of crime, is either unconstitutionally vague or applicable solely to professional money launderers.

2. Whether the district court erred in refusing to disregard the sentencing range prescribed by the Sentencing Guidelines and sentence petitioner based solely on the factors set forth in 18 U.S.C. 3553(a)(2).

3. Whether, in sentencing petitioner, the district court erred in employing Sentencing Guidelines § 2S1.1, the Guideline applicable to money laundering offenses.

4. Whether the district improperly enhanced petitioner's offense level by three points, under Sentencing Guidelines § 2S1.1(b)(1), because of his belief that the funds he laundered were the proceeds of drug trafficking.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-426

ROBERT LOEHR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6a-12a) is reported at 966 F.2d 201.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1992. A petition for rehearing was denied on July 24, 1992. The petition for a writ of certiorari was filed on September 9, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted of attempting to launder money represented by an undercover law enforcement officer to be the proceeds of unlawful activity, in violation of 18 U.S.C. 1956(a)(3)(B). He was sentenced to 41 months' imprisonment, to be followed by two years of supervised release. The court of appeals affirmed. Pet. App. 6a-12a.

1. The evidence at trial showed that petitioner was a car salesman in Grand Rapids, Michigan. Credell Carpenter, a convicted drug trafficker, advised FBI Special Agent Sanford Simon that in 1986 and 1987 petitioner had sold him and his girlfriend, Chrystal Bell, vehicles knowing that they were purchased with the proceeds of drug transactions. Carpenter said that petitioner knew Carpenter was a drug dealer at the time of those transactions. Pet. App. 7a.

With the assistance of Carpenter and Bell, Simon initiated an undercover investigation to determine whether petitioner was laundering money through his employer's car dealership. The undercover investigation required that Carpenter and Bell attempt to purchase an automobile after clearly informing petitioner that the purchase price was to be paid from drug proceeds. Pet. App. 7a.

Carpenter and Bell contacted petitioner and told him they wished to buy an automobile and that the money for the purchase would come from drug proceeds. In response, petitioner agreed to sell Carpenter a car for cash without executing an IRS Form 8300 evidencing a cash transaction in excess of $10,000, and he agreed to title the vehicle in a fictitious name. Petitioner presented the sales agreement, signed by Bell in a fictitious name, to

the general manager of the dealership, who typed the information on the proper form and completed the other necessary purchase documentation. Pet. App. 7a.

On the day of the transaction, Bell arrived at the dealership with an undercover agent and gave petitioner $20,000 in cash. Petitioner accepted the money and told Bell that she could take possession of the car that day. Thereafter, Simon and another FBI agent entered the dealership and found petitioner in a room counting the money. Pet. App. 7a-8a.

2. On appeal, petitioner contended that 18 U.S.C. 1956(a)(3)(B), the statute under which he was prosecuted, is unconstitutionally vague, and that it was not intended to apply to an individual, like himself, who was not engaged in money laundering before the initiation of the undercover operation. The court of appeals disagreed, holding that "[t]he provision is clear and applies to anyone who has the requisite intent to engage in the conduct defined in the statute." Pet. App. 11a.

In challenging his sentence, peititioner also argued that the district court erred in sentencing him under Sentencing Guidelines § 2S1.1, which covers money laundering offenses, because that Guideline was adopted before the enactment of Section 1956(a)(3)(B). The court of appeals held that the district court did not err in applying Section 2S1.1 to the factual situation in this case. Pet. App. 12a.

The court of appeals also rejected petitioner's challenge to the three-level upward adjustment he received under Section 2S1.1(b)(1) of the Sentencing Guidelines, which, at the time of petitioner's offense, required such an enhancement if the defendant "knew or believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution

of narcotics." The court of appeals concluded that the evidence was sufficient to prove that petitioner had the necessary "knowledge or belief" that the funds for the purchase of the car were drug proceeds. Pet. App. 12a.

Finally, the court rejected without discussion petitioner's claim that the district court should have disregarded the sentencing range prescribed by the Sentencing Guidelines and sentenced him based solely on the factors enumerated in 18 U.S.C. 3553(a)(2).[1] Pet. App. 12a.

ARGUMENT

1. Petitioner renews (Pet. 17-25) his contention that Section 1956(a)(3)(B) is unconstitutionally vague and was not intended to apply to persons, like himself, who were not engaged in money laundering before the undercover operation. The court of appeals correctly rejected those claims.

The principles applicable to vagueness analysis are well established. To show that a statute is unconstitutionally vague, a criminal defendant must show that the statute in question is vague as applied to the particular conduct with which the defendant is charged. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & n.7 (1982).[2] To sustain such a vagueness attack, the defendant must show that the statute fails to give a person of ordinary intelligence

[1] The considerations enumerated in Section 3553(a)(2) include the seriousness of the offense, deterrence of criminal conduct, the protection of the public, and the rehabilitative needs of the defendant.

[2] This general rule applies outside the First Amendment context. In First Amendment cases a defendant may be able to assert a claim of vagueness based on uncertainty about the statute's application to cases not before the court. See *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988).

reasonable notice that his conduct is forbidden. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983).

Section 1956(a)(3)(B) is not vague as to the conduct for which petitioner was convicted in this case. The statute applies to anyone who "conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity," if the defendant intends "to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity." 18 U.S.C. 1956(a)(3)(B). The statute further states that the word "represented," as used above, includes any representation made by a "person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of [the statute]." 18 U.S.C. 1956(a). Here, the evidence showed that, at the specific direction of Agent Simon, Carpenter and Bell clearly informed petitioner that they intended to use the proceeds of illegal drug transactions to purchase the automobile. See Pet. App. 7a. Accordingly, petitioner clearly had the knowledge necessary to violate the statute.

Petitioner argues (Pet. 20-21) that the statute is vague because it provides law enforcement agents with no guidance as to who should be targeted for an undercover operation. He suggests that Congress intended merely to give law enforcement officers an additional tool to pursue the types of offenders who had already been targeted by the money laundering statute, rather than to authorize them to direct undercover operations against any citizen. Putting aside the merits of that argument, petitioner is in no position to benefit from it, since Agent Simon had evidence that on two previous occasions peti-

tioner had laundered drug proceeds for Carpenter and Bell in violation of 18 U.S.C. 1956(a)(1). In any event, Congress's use of the word "whoever" in Section 1956(a)(3) clearly reflects its intent not to limit the possible targets of money laundering undercover operations in the manner petitioner suggests.

Petitioner further argues (Pet. 21-22, 25) that Section 1956(a)(3)(B) is vague because it does not address defendants who do not believe the representation that the property consists of the proceeds of unlawful activity. The plain terms of the statute refute that argument. Section 1956(a)(3)(B) requires that the defendant "believe[]" the property to be the proceeds of specified unlawful activity. As the Seventh Circuit stated in rejecting a vagueness claim with respect to another subsection of the money laundering statute, 18 U.S.C. 1956(a)(1)(B), the statute's requirements of specific intent and knowledge "'do[] much to destroy any force in the argument that application of the [statute] would be so unfair that it must be held invalid.'" *United States* v. *Jackson*, 935 F.2d 832, 839 (7th Cir. 1991), quoting *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 342 (1952).[3]

2. Petitioner contends (Pet. 14-17) that in sentencing him the district court should have disregarded the range

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[3] Petitioner's reliance (Pet. 18-19) on *Kolender* v. *Lawson*, 461 U.S. 352 (1983), is unavailing. In that case, a California statute required individuals who loiter or wander the streets to provide "credible and reliable" identification, and to account for their presence when requested by a police officer under circumstances that would justify a stop under *Terry* v. *Ohio*, 392 U.S. 1 (1968). This Court held that the statute was unconstitutionally vague by failing to clarify what it meant by "credible and reliable" identification. There is no analogous indeterminate language in Section 1956(a)(3)(B).

prescribed by the Sentencing Guidelines because it was out of keeping with the directive in 18 U.S.C. 3553(a) that the court "impose a sentence sufficient, but not greater than necessary, to comply" with the purposes of sentencing as set forth in Section 3553(a)(2). He suggests that sentencing courts may impose sentences considering only the factors set forth in that provision, without reference to the Guidelines. That argument is without merit.

Congress has made clear that sentencing courts may not disregard the Guidelines. Section 3553(a)(4) states that the sentencing court "shall" consider "the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines." Likewise, Section 3553(b) states that "[t]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4)."

Under Section 3553(b), "[t]he only circumstance in which the district court can disregard the mechanical dictates of the Guidelines is when it finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission [in formulating the guidelines]'." *Burns* v. *United States*, 111 S. Ct. 2182, 2184-2185 (1991). That does not mean, however, that the Guidelines may be ignored. As the Sixth Circuit concluded in *United States* v. *Davern*, 970 F.2d 1490, 1493 (1992) (en banc), "a district court must first determine a Guideline sentence, and then must consider whether there is an 'aggravating or mitigating circumstance,' that is, one not taken into account in setting the Guideline sentence." The court explained that "[u]ntil the judge has determined a sentence under

the Guidelines, it seems impossible to determine whether the mitigating or aggravating circumstance had in fact been taken into account in promulgating those specific Guidelines." *Ibid.* Although a sentencing court should consider the purposes of sentencing set forth in Section 3553(a)(2) in deciding what particular sentence to impose within the applicable Guidelines sentencing range, it "is not free to second-guess the Commission on what the range ought to be." *Davern*, 970 F.2d at 1499 (Nelson, J., concurring).

3. Petitioner contends (Pet. 13-14) that in sentencing him the district court should not have applied Sentencing Guidelines § 2S1.1, because that Guideline was promulgated before the amendment of 18 U.S.C. 1956 to cover money laundering offenses resulting from undercover operations.

Sentencing Guidelines § 1B1.2 states that the sentencing court should employ the Guideline "most applicable to the offense of conviction." Here, the district court correctly applied Guidelines § 2S1.1, since that is the only Guideline applicable to offenses involving the laundering of monetary instruments. It makes no difference that that Guideline was promulgated prior to the amendment of Section 1956 to reach the targets of undercover operations. In other contexts, the Sentencing Commission has not distinguished among defendants guilty of the same offense based on whether they were arrested as a result of an undercover investigation. Moreover, the correctness of the district court's use of Section 2S1.1 is confirmed by the fact that the Statutory Index (Appendix A) to the November 1, 1991, version of the Guidelines—which was issued after the amendment of Section 1956 to cover undercover operations—indi-

cates that Section 2S1.1 is applicable to all violations of Section 1956.

4. At the time of petitioner's offense, Guidelines § 2S1.1(b)(1) (Nov. 1, 1990) mandated a three-level enhancement "[i]f the defendant knew that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances." Petitioner contends (Pet. 8) that the district court improperly applied that provision to him. Petitioner claims that he could not have "known" that the funds were the proceeds of drug trafficking, because in fact they were government funds used in an undercover operation.

The court of appeals reasonably construed the term "knew" in the 1990 version of Guidelines § 2S1.1 to reach well-founded belief as well as certain knowledge. The court's construction was reasonable in light of the language of the 1988 version of the substantive statute, 18 U.S.C. 1956, which reached not only cases in which a defendant correctly concluded that particular funds were the products of illegal activities, but also cases in which a defendant reached that belief based on representations made in the course of an undercover investigation. Compare 18 U.S.C. 1956(a)(2)(B) (1988), with 18 U.S.C. 1956(a)(3)(B) (1988). Nothing in the Guideline or its commentary suggests an intent to treat those two closely related cases differently for purposes of the three-level enhancement required by the 1990 version of Guidelines § 2S1.1.

Petitioner points out that the decision below conflicts with the Fifth Circuit's decision in *United States* v. *Breque*, 964 F.2d 381 (1992). In *Breque*, the Fifth Circuit held that the word "knew," as used in the November 1, 1990, version of Section 2S1.1(b)(1), does not cover a de-

fendant who believes that the funds are the proceeds of drug trafficking when in truth they are not. In so holding, the court relied on a November 1, 1991, amendment to the Guideline, which changed the Guideline to read, "If the defendant knew or believed that the funds were the proceeds of an unlawful activity * * * increase by three levels."[4]

There is no need for this Court to resolve the conflict between the Fifth and Sixth Circuits. The issue presented is of little continuing importance in light of the 1991 amendment of Section 2S1.1(b)(1), which clarified the matter and left no doubt that the enhancement may be applied based on the defendant's belief that the money he laundered consisted of drug trafficking proceeds. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991) (because the Sentencing Commission regularly promulgates clarifying amendments on sentencing issues that divide the lower courts, the intervention of this

[4] Petitioner suggests (Pet. 8, 12) that it violated the Ex Post Facto Clause for the court of appeals to uphold the district court's interpretation of the pre-1991 Guideline. Petitioner argues that the court of appeals improperly relied on the amended Guideline in upholding his sentence, and he cites in support of that assertion the court's statement that petitioner had the "necessary knowledge or belief" that the source of the funds for the transaction was drug proceeds. Pet. App. 12a. There is no indication, however, that the court's use of the word "belief" was meant to signal that it was relying on the amended Guideline. In upholding the district court's application of Section 2S1.1, the court of appeals did not even refer to the amended version of Section 2S1.1. In short, the court of appeals, like the district court before it, construed the pre-1991 version of the Guideline rather than the amended version. The court of appeals' passing reference to the word "belief" merely indicates that the court understood the term "knew" in the 1990 version of Guidelines § 2S1.1 to encompass a belief based on an undercover agent's representations.

Court is not ordinarily needed to resolve such disputes). This Court's review of the fact-bound application of a Sentencing Guideline that is no longer in effect is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992